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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

METRO INDUSTRIES, INC.
Petitioner,
v.

SAMMI CORPORATION,
SAMMI (AMERICA) CORPORATION,
KEN CARTER INDUSTRIES, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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July 29, 1996

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QUESTIONS PRESENTED

Section 1 of The Sherman Antitrust Act prohibits combinations "in restraint of trade or commerce . . . with foreign nations." Market division arrangements are generally deemed to be illegal ***per se*** under The Sherman Act.

The questions presented are:

1. Should a new antitrust principle be established -- that "foreign conduct cannot be examined under the *per se* rule"?

2. Should a market division arrangement among Korean exporters to divide and allocate products to be exported to the United States be exempt from ***per se*** analysis because "the conduct in question occurred in another country?"

3. Should a market division arrangement among Korean exporters to divide and allocate products to be exported to the United States be exempt from ***per se*** analysis because that particular type of market division has not previously "undergone judicial scrutiny in The Sherman Act context?"

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There are no other parent or subsidiary companies to be listed.

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PETITION FOR WRIT OF CERTIORARI

Metro Industries, Inc. ("Metro") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is contained in the Appendix ("App.") at App. A, p. 1a. The Order and Judgment of the District Court is at App. B, p. 22a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of The Sherman Antitrust Act, 15 U.S.C. §1, provides, in relevant part, that "[e]very . . . combination . . . in restraint of trade or commerce . . . with foreign nations is declared to be illegal." The full text of the statute is App. C, p. 26a.

STATEMENT OF THE CASE

A. *The Korean Market Division Arrangement*

The Korean Metal Flatware Exporters Association ("export association") is a group of companies which controls the export of a variety of metal products from Korea, including the stainless steel products which are at issue in this action. The stated goals of the export association include avoiding "overcompetition" on price and regulating product quality. (Reporters Transcript ("R.T.") Vol. 11, p. 180, L.5 - p. 182, L.24 [testimony of K. Park, officer of Respondent Sammi Corporation ("Sammi")].)

The export association operates a "design registration" system, under which the members of the association divide and allocate products available for export. A particular exporter can "register" a product with the association and thereby gain exclusive control over the export of that product. With such a "registration" in place, the individual exporter can regulate the supply of the registered product to the United States. No other Korean company can export a competing product to the United States without the permission of the registration holder. (R.T. Vol. 3PM, p. 43, L.11, p. 44, L.12; Vol. 5, p. 156, L.25, p. 157, L.11 and p. 182, L.4-19; Vol. 11, p. 147, L.12, p. 148, L.16 an p. 158, L.10-13 [K. Park].)

The design registration system is a private business arrangement. The Korean government neither directs nor compels these exporters to operate such a system. (R.T.

Vol. 3PM, p. 44, l.8-12; R.T. Vol. 6, p. 84, L.22, p.85, L.18; R.T. Vol. 11, p. 88, L.16-23). The "registration", itself, is not ancillary to any property right and does not reflect inventiveness, creativity, or ingenuity. It is merely an "administrative priority" for exporters:

> "[I]t is not based at all on inventiveness, creativity or ingenuity. Indeed, the registration itself contains simply a photograph of the item . . . [and] says nothing about size, color, measurements or the like. It is merely an administrative priority for exporters only. Registration . . . does not give the Korean manufacturer or exporter any property rights or protection. . . . [I]t is not sanctioned or registered for any type of protection with the Korean government. It is administered by a self-regulating association with no governmental or legal powers." (Trial Exhibit ("Ex.") 783, Declaration of S.W. Kim, a Sammi official, Para. 5, reproduced at App. D, p. 29a.)

B. The Impact Of The Market Division Arrangement On United States Imports

1. The Affected Products

Stainless steel steamers are multi-purpose cooking vessels used in the kitchen on the stove burner to prepare foods such as vegetables, rice, seafood, and pastas, by steaming. They are available in different sizes, based on capacity (e.g., eight quart, five quart, three quart). (Ex. 43, pp. 4, 5 [product brochure]). Stainless steel is a unique material, resistant to corrosion, durable, lightweight, easily cleaned, and aesthetically pleasing. (R.T. Vol. 2, p. 62, L.25 - p. 63, L.19 and p. 64, L.13 - p. 65, L.7.) Because of such features, stainless steel steamers face no meaningful competition from steamers made of other materials (e.g., bamboo, aluminum). (R.T. Vol. 3PM, p. 60, L.20 - p. 62, L.9 and p. 65, L.22 - p. 66, L.13; Vol. 7, p. 35, L.23 - p. 36, L.17

and p. 37, L.8 - p. 38, L.4 [testimony of H. Burgeson, buyer for Montgomery Ward,]; Vol. 7, p. 111, L.2-17 and p. 113, L.5 - p. 114, L.2.

Stainless steel steamers are manufactured only in Korea and exported from Korea to customers in the United States, including importer/wholesalers such as The Vollrath Company ("Vollrath) and Metro. (R.T. Vol. 6, p. 19, L.1 - p. 20, L.7; Vol. 3PM, p. 42, L.13-19.) Importer/wholesalers sell steamers to retailers, such as Montgomery Ward and Sears, for resale to consumers, either from store shelves or through catalogues. (R.T. Vol. 7, p. 256, L.21- p. 26, L.15 [Burgeson].) The structure of the stainless steel industry in Korea is highly concentrated, with Sammi holding near-monopolistic control. At the raw material level, Sammi owns a steel company (Sammi Steel) which is the only source in Korea of the stainless steel sheets from which products such as stainless steel steamers are fabricated. (R.T. Vol.2, p. 61, L.1-14; Vol. 3, p. 35, L.10-22; Vol. 5, p. 111, L.1-7].) At the manufacturing level, Sammi Steel sells stainless steel sheets to an independent manufacturer, a company called Dae Sung, then Sammi buys the finished product from Dae Sung. Sammi exercises strong control over Dae Sung, with the objective of keeping Dae Sung-manufactured steamers from reaching Sammi's export competitors. (R.T. Vol. 3PM, p. 42, L.20 - p. 43, L.10; Ex. 416 (pp. 1-2); Ex. 429 A.)

2. Sammi's Use Of The Market Division Arrangement To Restrict Exports of Steamers

Prior to 1981, there was no stainless steel steamer market in the United States. (R.T. Vol. 3PM, p. 53, l.5-9). Late in that year, Metro raised the idea of a line of stainless steel steamers with Sammi, provided Sammi with models, and asked Sammi to develop samples and prepare to supply the steamers. (Ex. 416, p. 1.) Recognizing the sales potential for stainless steel steamers, Sammi moved immediately to keep its export competitors from gaining access to the product line,

obtaining agreement from its steamer manufacturer, Dae Sung, not to show the products to any other customers. (Ex. 416, p. 11-12.) Sammi was concerned with controlling both the volume and the price of the steamers. (Ex. 450 and 460, reproduced at App. E, pp. 31a and 32a). Shortly thereafter, Sammi registered the steamer concept with the export association, thereby obtaining full control over the export of steamers. (Ex. 409, R.T. Vol. 3PM, p. 51, L.2-6; Vol. 5, p. 179, L.12-24). With this market division arrangement in place, Sammi has been able to regulate the supply of stainless steel steamers to the United States. No competitor or potential competitor has been able to export steamers to the United States without Sammi's permission. (R.T. Vol. 3PM, p. 43, L.11 - p.44, L.12; Vol. 5, p. 156, L.25 - p. 157, L.11 and p. 182, L.4-19; Vol. 11, p. 147, L.12 - p. 148, L.16 and p. 158, L.10-13.)

Sammi began to supply steamers to Metro but, during 1983, interrupted the supply. (R.T. Vol. 3PM, p. 44, L.23 - p. 45, L.6.) Metro, highly concerned about the success of its new steamer product line, pressed Sammi for the reason for the interruption. For about three months, Sammi told Metro that the manufacturing molds were broken. (R.T. Vol. 3PM, p. 45, L.15 - p. 52, L.4.) Metro then went to another supplier, Hai Dong, and asked Hai Dong to obtain steamers from the manufacturer, Dae Sung, and supply them to Metro. Hai Dong was unable to obtain steamers from Dae Sung (R.T. Vol. 3PM, p. 52, L.8 - p. 53, L.4) because, behind the scenes, Sammi was following Metro's attempts to order through Hai Dong and was instructing Dae Sung not to supply the steamers to Hai Dong. ["...let him [Metro] realize that factory is tightly tied to Sammisa and, if possible, let him understand maker will use Sammisa only as their export window."].) (Ex. 429A, Reproduced at App. E, p. 33a). Metro was forced to apologize for ordering from Dae Sung through Hai Dong, rather than Sammi, and to promise that it would not happen again. (Ex. 449). On February 19, 1984, Sammi informed its subsidiary in Los Angeles that Dae Sung had promised not to

ship an order for 6,000 pieces placed by Metro through Hai Dong, (Ex. 460, Reproduced at App. E, p. 32a), citing Hai Dong's "lower price" and "bad behavior".

In February of 1984, Metro was still attempting to import stainless steel steamers from a Korean supplier, and the shipments were still being blocked by Sammi. (R.T. Vol. 3PM, p. 54, L.1, p. 59, L.4).

In early 1983, at the same time that Sammi began to use the market division arrangement to block Metro, Vollrath, one of Metro's importing competitors, began an intensive and urgent program to develop new stainless steel steamer models for its customers. Vollrath poured extensive effort into this development program, consulting with home economists and key customers. (R.T. Vol. 4AM, p. 29, L.4-21; L.22, p. 87, L.5) Vollrath's major consumers, such as Montgomery Ward, Sears, Ace Hardware, Cotter, Macy's Jordan Marsh, Gimbels - were enthusiastic about the new steamers, which had a number of distinctive features that buyers desired. (R.T. Vol. 4Am, p. 29, L.22, p. 31, L.7; Vol. 4-B, p. 19, L.5, p. 20, L.15; Vol. 7, p. 27, L. 15, p. 29, L.1; Vol. 4-B, p. 15, L.25, p. 17, L.4 and p.18, L.7-18.)

All of the eligible suppliers of the stainless steel steamers were in Korea (R.T. Vol. 6, p. 19, L.1, p. 20, L.7; Vol. 3PM, p. 42, L.13-19) and belonged to the export association. Vollrath interviewed potential Korean suppliers for the steamers, including Sammi. Vollrath rejected Sammi as a supplier because its prices were high and its quality was low. (R.T. Vol. 6, p. 36, L. 19, p. 37, L.8.) Vollrath selected Dae Lim as its supplier, a manufacturer with whom it had done other business and whose quality and reliability Vollrath respected. (R.T. Vol. 5, p. 148, L.16-19; p. 160, L.11-15.)

During the summer of 1983, Vollrath supplied Dae Lim with designs, obtained samples, and then placed an order for $2.1 million worth of stainless steel steamers, with shipments

to commence in October. (Ex. 258 and R.T. Vol. 5, p. 149, L.10, p. 150, L.13; p. 150, L.24, p. 151, L.19; p. 159, L.10-13.) The timing of the shipments was critical to Vollrath. Several of its major customers, including its largest customer, Montgomery Ward, had committed to catalogue marketing programs for the steamers. (R.T. Vol. 4-B, p. 23, L.3, p. 24, L.6; Vol. 7, p. 29, L.11-21.) These companies were required to have supplies in inventory at the time the catalogues went to press - in this case, approximately December 1, 1983. If Vollrath could not guarantee supplies at that point, Vollrath had an obligation to notify the customer and the items would have to be withdrawn from the catalogue. (R.T. Vol. 7, p. 32, L.23, p. 33, L. 24; Vol. 5, p. 22, L.10, p. 23, L.5.) Because these major retailers operate on a six-month planning cycle in their catalogue programs, a delay in the initial product shipments beyond the deadline would have the practical effect of delaying the catalogue program by six months. (R.T. Vol. 7, p. 33, L.25, p. 35, L.5; Vol. 2, p. 88, L.2-23.)

The timing of the shipments was also critical because of the approaching Christmas season - a major sales period in which it was essential to have these steamers available for retail shelves - as Vollrath had promised other customers. (R.T. Vol. 2, p. 82, L.19, L.25; Vol. 4-B, p. 24, L.7, p. 25, L.7.)

In the Fall of 1983, with the steamers in production at Dae Lim, Volrath learned from Dae Lim that Sammi intended to block Dae Lim from shipping the steamers to Vollrath, having obtained control over the export of steamers through the design registration program of the export association. (R.T. Vol. 5, p. 156, L.25, p. 157, L.23.) Dae Lim said it was working to try to change the situation, but could not guarantee that the shipments would be made. (R.T. Vol. 5, p. 174, L.6-22; Ex. 407.) According to Dae Lim, "if Sammi didn't want to agree, they had the power to veto." (R.T. Vol. 5, p. 180, L.19-24.) Increasingly distressed as the problem continued, Vollrath sent a delegation to Korea to confront Sammi directly. In a meeting at Sammi's offices in Seoul on November 1,

Vollrath threatened to take the problem to the Korean government if Sammi did not relent. (R.T. Vol. 5, p. 174, L.25, p. 176, L.18.) At that meeting, Sammi promised to allow some shipments to proceed. (R.T. Vol. 5, p. 176, L. 19, p. 177, L.2.)

In fact, however, no shipments were released, and the blockage continued on through November and into December. (R.T. Vol. 5, p. 177, L.1, L.15.) By this point Vollrath, though contractually committed to its order (large portions of which Dae Lim had manufactured and packaged over the preceding four months), had to notify its catalogue and retail shelf customers that the steamers would not arrive in time. (R.T. Vol. 5, p. 22, L.22, p. 23, L.5.) This was heavily damaging to Vollrath, both in terms of lost catalogue and Christmas business and in terms of its reputation as a reliable supplier. (R.T. Vol. 2, p. 88, L.16-23; Vol. 4-B, p. 33, L.13, p. 35, L.8.) Montgomery Ward, in particular, became "leery" of future items that Vollrath might present to them, stating that to run a "promotion and not have the merchandise in the store is a cardinal sin." (R.T. Vol. 7, p. 34, L.6, p. 35, L.5.)

Sammi did eventually allow Dae Lim to ship portions of the initial order, which triggered yet another major problem for Vollrath. Backed-up steamers, which Dae Lim had been producing during the Summer and Fall of 1983, and which Vollrath had expected to begin receiving in early October to meet the catalogue and Christmas deadlines, began to arrive too late. (R.T. Vol. 9, p. 28, L.4-13.) The major catalogue deadlines and Christmas season had passed (R.T. Vol. 4-, p. 25, L.8-14), and Vollrath could not immediately dispose of the incoming steamer inventory. Vollrath was forced to incur extraordinary inventory costs, including the rental of an entire warehouse to house the backed-up steamers. (R.T. Vol. 9, p. 28, L.14, p. 30, L.14.)

Meanwhile, Vollrath had begun to press for assurance that, if it continued with the steamer business in the coming

seasons, future shipments would not be blocked by Sammi. Vollrath emphasized that it did not want a "one-shot" deal - it wanted to sell steamers for many years. (R.T. Vol. 6, p. 46, L.24, p. 48, L.11, p. 50, L.16-25; Ex. 405.) It could not obtain that assurance from either its buying agent or Dae Lim. (R.T. Vol. 5, p. 183, L.4-8; Ex. 408, Ex. 410.)

In early 1984, Metro, whose supplies were still being blocked by Sammi, sent a representative to Korea to meet with Mr. Nam, the manager of Sammi's export department. Mr. Nam had a Vollrath steamer manufactured by Dae Lim at the meeting, and told the Metro representative that Sammi would not let Dae Lim ship the unit to the United States in the future. (R.T. Vol. 3PM, p. 54, L.1, p. 59, L.4).

Vollrath's encounter with the Korean design registration system came at a critical time for its consumer products division, which was weighing whether it could continue in a business which necessarily relied on imports of stainless steel products from Korea. The experience with the stainless steel steamers showed Vollrath that it could not choose its suppliers in Korea, because of the design registration system, and therefore could not control the price and quality of its products. This led Vollrath to close its consumer products division. (R.T. Vol. 2, p. 105, L.15 - p. 106, L.7 ; Vol. 9AM, p. 33, L.2-15.) With the closing of the Vollrath business, the competing Dae Lim steamer was effectively eliminated from the United States market.

In 1983, Metro filed an antitrust action against Sammi, charging, inter alia, that the use of the design registration system to block competing exports to the United States violates Section 2 of The Sherman Act. On July 6, 1994, the United States District Court for the Central District of California granted a defense motion for summary judgment on all counts. (App. B, p. 22a)

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the summary judgment (App. A, p. 1), holding that Sammi could not be found liable under Section 2 of The Sherman Act, using the ***per se*** rules applicable to market divisions because "Foreign Conduct Cannot Be Examined Under The Per Se Rule" (Id., p. 12a). As an alternative ground for exempting the market division from ***per se*** analysis, the Ninth Circuit held that the ***per se*** rule could not be applied because this particular type of market division -- a "manufacturer-exporter design registration system" -- had not previously "undergone judicial scrutiny in The Sherman Act context. (Id., p. 11a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to avoid an unprecedented departure from fundamental antitrust principles in the international context. There is no basis in current law for the Ninth Circuit Court Of Appeals' flat and sweeping conclusion that "application of the ***per se*** rule [in antitrust analysis] is not appropriate where the conduct in question occurred in another country." (App. A, p. 12a). The consequences of allowing such a holding to stand, in today's fluid international business environment, are likely to be broad and drastic. For example, with the protection of this broad pronouncement by the Ninth Circuit, foreign cartels can aim price-fixing schemes, group boycotts, and market division agreements (activities which have been deemed ***per se*** illegal under United States antitrust laws for decades) directly at the United States market, with the assurance that their activities cannot be scrutinized for ***per se*** illegality. Among other things, this is virtually certain to hamper the international enforcement activity of the Antitrust Division of the Justice Department. Even the most obvious and egregious cartel schemes will be exempt from the ***per se*** rule (thus necessitating a far more costly and time consuming "rule of reason" market analysis), so long as the "conduct" (i.e., the agreement itself) occurs outside the United States.

This has nothing to do with the *jurisdictional* requirement for foreign application of the antitrust laws: that foreign conduct must produce some substantial effect in the United States. In this case, the market division arrangement set up by the Korean export association was aimed directly at exports to the United States, and the enforcement of the market division, in addition to injuring the Petitioner, Metro, eliminated competing product lines for United States consumers (the Dae Lim steamers) and eliminated a United States importer (the Consumer Products Division of The Vollrath Company). The Ninth Circuit actually conducted an independent jurisdictional inquiry and concluded:

> "Metro has made sufficient allegations to state a claim under the Sherman Act. Comity considerations are less compelling here than they were in *Timberlane*. Under *Hartford Fire Ins.*, 113 S. Ct. at 2910-11, there is no conflict with foreign law or policy because the Korean holloware registration system was not compelled by the Korean government, even though three government representatives serve on the design and pattern registration committee. Though Sammi is a foreign corporation, it apparently does a great deal of business in the United States, so it has assets which could be used to secure any judgment against it. The impact of the registration is felt more in the United States than in Korea because the registration system only limits the *export* of particular designs, and it was certainly foreseeable that these export restrictions could affect the United States. Considering all the factors, principles of comity and fairness do not deprive this court of jurisdiction." (App. A, p. 17a) (Emphasis in the Opinion)

No precedent is cited by the Ninth Circuit for its sweeping conclusion that "Foreign Conduct Cannot Be Examined Under the *Per Se* Rule" (App. A, p. 12a), and none has been located by the Petitioner. The cases cited in the Ninth Circuit opinion in connection with the conclusion (App. A, p. 12-13a) are

jurisdictional cases. The Opinion also refers to Areeda and Turner's Antitrust Law treatise in connection with the point (App. A, p.13-14a), but the treatise does not support the all-embracing conclusion. It simply explains that ***per se*** analysis would be inapplicable to foreign restraints that pose "very little danger to American Commerce" or have "more persuasive justifications" in the foreign market. (*Id.*) As an example, the cited portion of the treatise refers to "price fixing in a foreign country" that might have "very little impact on United States Commerce." (*Id.*) These (accurate) statements in the treatise are not tantamount to the Ninth Circuit's flat ruling that "Foreign Conduct Cannot Be Examined Under The *Per Se* Rule" (App. A, p. 12a), and the comments in the treatise are not applicable to the facts in this case.

Here, as the Ninth Circuit recognizes, the "impact" of the conduct "is felt more in the United States than in Korea because the registration system only limits the *export*" of the products and "it is certainly foreseeable that these export restrictions could affect the United States. (App. A, p. 17a). (Emphasis in the Opinion.)

This broad, new and unqualified exemption from the application of the ***per se*** principles of antitrust analysis, which will be applicable to all foreign conduct regardless of the scope or severity of the antitrust violation, is a fundamental departure from longstanding antitrust principles. Such an important question of federal law should be reviewed, and ultimately settled, by this Court.

This Court should also grant the Writ to review an alternative ground on which the Ninth Circuit based its decision to exempt this market division arrangement from ***per se*** analysis. Noting that this particular type of market division -- a "manufacturer - exporter design registration system" -- has not previously "undergone judicial scrutiny in The Sherman Act context" (App. 8, p. 11a), the Ninth Circuit concluded that the "novelty of this arrangement" calls for a

rule of reason analysis until the courts have more experience with it. (Id.)

Here, the Ninth Circuit, although acknowledging that the courts have considerable experience with market division arrangements and that "[a] market allocation agreement between competitors at the same market level is a classic ***per se*** antitrust violation" [citation omitted] (App. A, p. 10a), has nevertheless chosen to depart from the general rule in this case because the methodology of this particular market division ("registering" products with an export association) has not been examined previously.

This conflicts with a long line of decisions by this Court holding that "naked" restraints of trade, such as market divisions, are illegal ***per se***, regardless of the particular techniques and devices employed to effect the restraint. Obviously, there are infinite varieties of techniques and devices available to groups who wish to control and divide markets. The entire purpose of the longstanding ***per se*** prohibition on market divisions will be eviscerated if cartels can eliminate the ***per se*** analysis by simply using new terminology (e.g., "registering" products) and organizational descriptions (e.g., manufacturer/exporter association). At this point, form is clearly being elevated over substance.

Market division arrangements, regardless of how they are set up, are designed to eliminate "competition," which includes, among other things, customer choice among different products:

> "When we talk of the desirability of competition we ordinarily have in mind such things as low prices, innovation, *choice among differing products* -- all things that we think of as being good for consumers." (emphasis added)

Robert Bork, *Antitrust Paradox* (1978), p. 61. Here, Sammi was given the export market for stainless steel steamers under the Korean market division arrangement. It then used that monopoly control over exports to eliminate the Dae Lim steamer (which Vollrath was trying to order) and the Hai Dong steamer (which Metro was trying to order). United States customers were thus deprived of both "innovation" and "choice among differing products." And, according to the evidence, United States customers were also deprived of higher quality and lower prices. Vollrath had previously rejected Sammi as a supplier because its prices were high and its quality was low. (R.T. Vol. 6, p. 36, L.19 - p. 37, L.18.)

An arrangement dividing markets in this way is "inherently suspect" and quickly condemned unless it has a "plausible efficiency justification," as Phillip Areed puts it. (7 P. Areeda, *Antitrust Law* ¶1511 (1986). Or, as Robert Bork puts it, such an arrangement is ***per se*** illegal unless it is:

> ancillary to a contract integration; that is, the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose
>
> ***
>
> Where there is no coordination of productive activities . . . such an agreement is naked rather than ancillary and should be illegal per se. Bork, *op cit.*, p. 279.

In this case, the uncontradicted evidence (in the form of a Declaration prepared and submitted by the Respondent, Sammi Corporation) is that the registration system "is not based at all on inventiveness, creativity or ingenuity" and is not ancillary to any property right or other form of business activity. It is, in Sammi's own words, "merely an administrative priority for exporters only", enforced "by a self-regulating association" with export control "granted routinely."

(App. D, p. 29-30a). It is, in other words, a "naked" restraint of trade.

It is not necessary to determine if or when Sammi lowered its production or raised its prices after obtaining control of the product. The market division arrangement, itself, is "inherently suspect" and is to be condemned absent any "plausible economic justification." The elimination of all competition with respect to price and quality is *inherently* damaging to customers, who are deprived of any choice in the marketplace. Under the market division arrangement, all of the United States Customers have no choice but to take the Sammis product -- at whatever price and in whatever quantities Sammi chooses to impose. This is monopoly in its purest form, with an artificial barrier to entry -- the "design registration" -- that can not be overcome, regardless of the price or quality of the competing product. In economic terms, "the evil . . . is not higher prices or smaller production (though those are its concomitants) but misallocated resources, or allocation inefficiency." Bork, *op cit.*, p. 101.

THE OPINION OF THE NINTH CIRCUIT CONFLICTS WITH LONGSTANDING FUNDAMENTAL ANTITRUST PRINCIPLES ESTABLISHED THROUGH DECISIONS OF THIS COURT.

The oldest and clearest antitrust principle is that "naked" restrictions on competition (i.e., eliminations of market rivalry which are not ancillary to the creation of economic efficiency) are inherently damaging to consumer welfare and are therefore deemed *per se* illegal under Section 1 of The Sherman Act. The economic basis for this clear judgment is that such restrictions lead inexorably to control over prices and narrowed consumer choice. The roots of this basic principle are contained in the legislative history of The Sherman Act and in the seminal decisions of this Court interpreting the Act.

See, e.g., 21 Cong. Rec. 2456 (1890), where Senator Sherman, recognizing the inexorable connection between "naked" restraints and higher prices, called on the courts to "distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition. . ."; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897) and *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), where Justice Peckham framed the ***per se*** rule against elimination of rivalry with no efficient economic integration (in those two cases, the rivalry eliminated was price); *United States v. Addyston Pipe & Steel Co*, 85 Fed. 271 (6th Cir. 1898), where Judge Taft applied the ***per se*** standard against "naked" restraints and distinguished them from "ancillary" restraints, which are subordinate to separate business transactions (in that case, the "naked" restraints were price-fixing and market division); and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), where Justice White placed market division agreements in a ***per se*** category because of their inherent nature" and distinguished them from "rule of reason" practices (where efficiencies may exist), which require an investigation of the purpose and effect of the practice to determine legality.

Later decisions of this Court during the 1950's - 1970's which flesh out the basic principle in the context of market division arrangements and customer allocations among competitors include: *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (allocation of trade territories internationally, restricting imports into and exports from the United States, ***per se*** illegal, part of aggregation of restraints including price control); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (market division ***per se*** illegal, part of aggregation of restraints); and *United States v. Topco Associates*, 405 U.S. 596 (1972) (both market divisions and customer allocations, unaccompanied by other restraints, ***per se*** illegal).

More recently, this Court has turned its attention specifically to "naked" restrictions of the type involved here, in

NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 109-110 (1984):

> "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, where there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitve character of such an agreement.' [citation] . . . [T]he plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. [citations] We have never required proof of market power in such a case. [citations] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."

Then, in *F.T.C. v. Indiana Federation of Dentists*, 476 U.S 447, 460-461 (1986) this Court elaborated further:

> *[after quoting NCAA on the point that a "naked" restraint does not require market analysis]*
>
> "Moreover, even if the restriction imposed by the Federation is not sufficiently 'naked' to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. . . . Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects. 7 P. Areeda, *Antitrust Law* ¶1511, p. 429 (1986)."

In the case which is the subject of this Petition, an association of companies in Korea entered into an agreed elimination of rivalry by giving Sammi exclusive control over the export of stainless steel steamers - a market division agreement. This agreement was not ancillary to any separate business purpose nor did it involve the creation of any economic integration or efficiency. This was a "naked" restriction. Having obtained control over steamer exports through that market division, Sammi then used that power to effect a direct output restriction: blocking Dae Lim from supplying Vollrath's products, causing "actual detrimental effects." This is precisely the evil to which The Sherman Act's ***per se*** rules are directed.

CONCLUSION

This is an important issue as the United States attempts to administer its antitrust laws in an increasingly fluid international context. When foreign companies exporting to the United States divide markets and restrict output, there is a direct effect on "United States Commerce," which includes the "import" commerce of the United States. H.R. No. 97-637, Leg. Hist. P.L. 97-290, 1982 U.S. Code Cong. and Admin. News, 2431, at 2494-2497. "[I]t is important that there be *no misunderstanding* that import restraints, which can be damaging to American consumers, remain covered by the law." (*Id.* at 2494.) (emphasis added)

For the reasons stated, the Petition for Writ of Certiorari should be granted

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

METRO INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

SAMMI CORPORATION, SAMMI (AMERICA) CORPORATION; KEN CARTER INDUSTRIES, INC.,
Defendants-Appellees.

No. 94-56180
D.C. No. CV-83-07931-MRP
OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
February 8, 1996—Pasadena, California

Filed April 29, 1996

Before: Cecil F. Poole, Charles Wiggins, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Antitrust/Restraint of Trade/Sherman Act

The court of appeals affirmed a district court judgment. The court held, among other things, that the "rule of reason" analysis was appropriate in an action in which an importer alleged that a Korean design registration system violated Sherman Antitrust Act § 1.

Appellee Sammi Corp., a South Korean exporting company, is a member of the Korea Holloware Association. The Association, through a design registration committee, grants pattern and design registration rights for particular products based on the products' shape, appearance, and color. The registration committee includes, among others, members of Korean government organizations. A trading company can only hold a pattern design right jointly with a manufacturer. Registration gives the design holder the exclusive right to export a particular design for three years. The rights may be extended for three additional years.

Appellant Metro Industries, Inc., an importer and wholesaler of kitchenware, sued Sammi and two of Sammi's American subsidiaries alleging that the Korean design registration system constituted a market division that is a *per se* violation of § 1 of the Sherman Act. Metro alleged that Sammi used the registration system to prevent Metro and other kitchenware importers from acquiring Korean-made stainless steel steamers from any of Sammi's competitors in Korea.

Meanwhile, a second importer of Korean kitchenware, the Vollrath Co., had filed a similar action in the same district court against Sammi and its two United States subsidiaries. Vollrath's claims were based on accusations of predatory pricing and output restriction. The jury returned a verdict in favor of Vollrath, but the district court granted judgment notwithstanding the verdict (JNOV) in favor of all defendants on all claims. The court of appeals affirmed the JNOV, holding, among other things, that the evidence could not support Vollrath's claims of attempted monopolization based on a predatory pricing theory. The court of appeals also determined that the relevant market and Sammi's power within that market had not been sufficiently defined.

In the Metro case, the district court granted Sammi's motion for summary judgment and denied Metro's cross-motion. Metro appealed the grant of summary judgment

in favor of Sammi on its Sherman Act § 1 market division claim and the denial of its cross-motion for summary judgment.

[1] The Korean registration system was not a classic horizontal market division agreement in which competitors at the same level agreed to divide up the market for a product. [2] In addition, there was no evidence of a negative effect on competition, [3] and there was no evidence that the purpose of the design registration system was to restrain trade. [4] Therefore, the "rule of reason" analysis was appropriate in this case.

[5] Even if Metro could prove that the registration system constituted a "market division" requiring application of the *per se* rule if the division occurred in a domestic context, application of the *per se* rule is not appropriate where the conduct in question occurred in another country. Determining whether the registration system violated the antitrust laws would still require examination of the impact of the system on commerce in the United States. Where a Sherman Act claim is based on conduct outside the United States, the rule of reason analysis is applied to determine whether there is a Sherman Act violation.

[6] Metro made sufficient allegations to state a claim under the Sherman Act. Considering the relevant factors, principles of comity and fairness did not deprive the court of appeals of jurisdiction. [7] Metro made the minimal allegations about the impact on competition in the United States necessary to state a claim for a violation of the Sherman Act. There was jurisdiction to review Metro's claims and examine Sammi's alleged conduct under the rule of reason.

[8] Metro pointed to little evidence of the impact of the Korean registration system on competition in the United States. Under the record from the Vollrath case, a rational trier of fact could not find in favor of Metro on its Sherman

Act claim. [9] Metro produced no evidence of actual injury to competition in the United States. [10] The record insufficiently established a relevant market; [11] Metro based its opposition to Sammi's summary judgment motion on the record from the Vollrath case. Metro did not present sufficient evidence from which a rational finder of fact could conclude that Sammi had market power in a relevant market. Metro could not show that it suffered an antitrust injury, and could not recover for any alleged violation of Sherman Act § 1 by Sammi. Sammi's motion for summary judgment was properly granted.

COUNSEL

William P. Tedards, Jr., Washington, D.C., for the plaintiff-appellant.

Thomas G. Bailey, Jr., John E. Tardera, Whitman, Breed, Abbott & Morgan, New York, New York, for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

Metro Industries, Inc. ("Metro"), an importer and wholesaler of kitchenware, sued Sammi Corp. ("Sammi"), a South Korean exporting company, and two of its American subsidiaries alleging, *inter alia*, that a Korean design registration system, which gives Korean holloware producers the exclusive right to export a particular holloware design for three years, constituted a market division that is a *per se* violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Metro alleges that Sammi used this registration system in 1983 to prevent Metro and other kitchenware importers from acquir-

ing Korean-made stainless steal steamers from any of Sammi's competitors in Korea.

Metro appeals the district court's grant of Sammi's motion for summary judgment on Metro's Sherman Act § 1 claim, which was based on the district court record from *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2163, 128 L. Ed. 2d 886 (1994), a case in which another importer of Korean kitchenware sued Sammi for alleged violations of §§ 1 and 2 of the Sherman Act. We have jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

FACTS AND PROCEDURAL HISTORY

Metro is an importer and distributor of kitchenware products. Metro started a stainless steel kitchenware business in about 1977, importing mixing bowls from a Korean supplier called Haidong. In 1978 it began to purchase bowls from Sammi, and over the next few years, expanded its business to include other kitchenware. By 1981, importing and selling stainless steel kitchenware constituted Metro's principal business activity.

Sammi is a large Korean trading company that purchases a wide variety of finished products, including stainless steel steamers, for export to the United States and other countries. Sammi is a member of the Korea Holloware Association. *See Vollrath*, 9 F.3d at 1462. This association, through a thirteen-member design registration committee, grants pattern and design registration rights for particular products based on the shape, appearance, and color of the products. *Id.* The registration committee consists of members from manufacturing companies, trading companies, the Korea Association of patent attorneys, and three members of Korean government organizations. A trading company, such as Sammi, can only hold a pattern design right jointly with a manufacturer. *Id.* Registration gives the design holder the exclusive right to

export a particular design for three years, and the rights can be extended for three additional years.

According to Metro, in late 1981, it raised the idea of a line of stainless steel steamers with Sammi, provided Sammi with models, and asked Sammi to develop samples and to prepare to supply the steamers. Sammi registered the steamer design and began to supply Metro with steamers. Metro experienced a disruption of steamer deliveries from Sammi at some time during 1983. Metro alleges that its attempts to order the steamers from another company were blocked by Sammi. Eventually, in late 1983, Metro was able to secure a source of steamers from a Korean company called Sambo and apparently had no further disruptions in its steamer shipments.

In December 1983, Metro filed a complaint in the United States District Court for the Central District of California against Sammi and two of its American subsidiaries alleging violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and §§ 2, 3, and 7 of the Clayton Act (15 U.S.C. §§ 13, 14, and 18), and various violations of California law. In June 1984, the claims against Sammi were dismissed for lack of personal jurisdiction.

In June 1986, the district court commenced a bench trial on Metro's claims against the two American subsidiaries. The essence of Metro's case against the subsidiaries was that they had engaged in predatory pricing with the intent of monopolizing the stainless steel steamer and mixing bowl markets. After several days of trial on certain issues of the predatory pricing case, the two subsidiaries filed a motion for involuntary dismissal, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, on the grounds that Metro had not presented a *prima facie* case and could not present such a case with its remaining witnesses. The district court took the Rule 41(b) motion and an earlier motion for summary judgment under advisement and postponed the remainder of Metro's trial pending the court's decisions on Sammi's motions.

Meanwhile, a second importer of Korean kitchenware, the Vollrath Company, filed a similar action in the same district court against Sammi and its two U.S. subsidiaries. As in Metro's case, the district court granted Sammi's motion to dismiss for lack of personal jurisdiction. However, in February 1988, the district court granted Vollrath's motion to reconsider the court's jurisdiction over Sammi, and Sammi was reinstated as a defendant in both Vollrath's and Metro's cases. Defendants' 1986 motion for involuntary dismissal was denied without prejudice in May 1988.

The trial on Vollrath's claims against Sammi and its subsidiaries for violation of §§ 1 and 2 of the Sherman Act and the California Unfair Trade Practices Act, based on accusations of predatory pricing and output restriction, was conducted during March and April of 1989. On April 11, 1989, the jury returned a verdict in favor of Vollrath, awarding $9,478,676 in damages on the federal claims and $711,803 in damages on state law claims, for a total of over $29 million in damages after trebling the award on the federal claims. On December 27, 1989, however, the district court granted judgment notwithstanding the verdict ("JNOV") in favor of all defendants on all claims.

On appeal, we affirmed the district court's JNOV on all of Vollrath's theories. First, we held that the evidence presented could not support Vollrath's claims of attempted monopolization based on a predatory pricing theory. *Vollrath*, 9 F.3d at 1460-62. Second, we held that Vollrath could not sustain a Sherman Act § 2 attempted monopolization claim against Sammi for its temporary assertion of its rights to a particular rice steamer design, which prevented Vollrath from receiving steamers from another Korean exporter for a three-month period. We found that "[t]here was insufficient evidence concerning the relevant product and geographic market and Sammi's power in that market," making it impossible to find a dangerous probability that Sammi could gain monopoly

power over any market in the United States. *Id.* at 1462.[1] We did not consider Vollrath's claim that Sammi and other exporters in Korea engaged in a naked restraint of trade by establishing the export registration system, allegedly constituting a *per se* violation of § 1 of the Sherman Act, because Vollrath had not presented that theory to the district court. *Id.* at 1462 n.4. The Supreme Court denied certiorari. *See* 114 S. Ct. 2163 (1994).

Meanwhile, the defendants in the Metro case filed motions for summary judgment in 1990 after the district court's JNOV but before this court considered Vollrath's appeal. Both sides in the Metro case explicitly agreed that the issues in the Metro and Vollrath cases were essentially the same and that the district court should rely on the *Vollrath* record along with the limited Metro record in ruling on the motions for summary judgment. The district court ordered the Metro case off calendar, pending our resolution of the Vollrath case.

Immediately after our *Vollrath* decision, the district court scheduled a status conference for the Metro case, held on December 20, 1993. Subsequent to the district court's decision in the Vollrath case, Metro began arguing a new theory—that the Korean design registration system under which Sammi had the exclusive rights to manufacture a particular steamer design constituted a market division that was illegal *per se* under § 1 of the Sherman Act.[2] In May 1994, Sammi filed a motion to dismiss all claims against Sammi and its subsidiaries pursuant to Rules 52(c) and 56(b) of the Federal Rules of Civil Procedure. Metro filed an opposition and cross-motion for partial summary judgment on the liability portion

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[1]We also affirmed the district court's holding that there could be no anti-competitive conspiracy among Sammi and its subsidiaries because of their common ownership, and the district court's holding that there was no violation of the California Unfair Trade Practices Act. *Id.* at 1463-64.

[2]This was the same theory that we declined to consider in *Vollrath* because it had not been raised before the district court in *Vollrath*.

of the market division claim, relying entirely on the *Vollrath* record. The district court granted Sammi's motion for summary judgment and denied Metro's cross-motion, finding that Metro had failed to present sufficient evidence to carry its burden on any of its claims.

DISCUSSION

Metro appeals only the district court's grant of summary judgment in favor of Sammi on Metro's Sherman Act § 1 market division claim and the court's denial of Metro's cross-motion for summary judgment. We review a district court's grant of summary judgment *de novo*. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996).

Section 1 of the Sherman Antitrust Act, as amended in 1990, reads, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1 (1994).[3] Metro alleges that the Korean Hollowware Association registration system constitutes a "naked" market division agreement, which is *per se* illegal under the Sherman Act. Thus, Metro argues, an examination of the impact of the registration system on competition in the United States is not necessary to find a violation of § 1.

Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, *per se* analysis is not appropriate. Indeed, when the alleged illegal conduct

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[3]The 1990 amendments only increased the penalty provisions of § 1, and did not change the language quoted above.

occurred in a foreign country, we must examine the impact on commerce in the United States before we can determine that we have subject matter jurisdiction over a claim. Because the *Vollrath* panel determined on the same facts before us that the relevant market and Sammi's power within that market had not been sufficiently defined, Metro cannot prove injury to competition based on the *Vollrath* record and cannot recover on its Sherman Act claim.

I. Per Se Treatment is Inappropriate in This Case

"Ordinarily, whether particular concerted activity violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, 'the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723, 108 S. Ct. 1515, 1519, 99 L. Ed. 2d 808 (1988) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977)). "Certain categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation." *Id.* "Such agreements are those that always or almost always tend to restrict competition and decrease output." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (internal citations omitted). In general, "[a] market allocation agreement between competitors at the same market level is a classic *per se* antitrust violation." *Id.*

A. The Korean Registration System is Not Illegal Per Se

Where the conduct at issue is not a garden-variety horizontal division of a market, we have eschewed a *per se* rule and instead have utilized rule of reason analysis. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir.), *cert. denied*, 464 U.S. 849, 104 S. Ct. 156, 78 L. Ed. 2d 144 (1983); *see also Cayman Exploration Corp. v. United Gas*

Pipe Line Co., 873 F.2d 1357, 1360 (10th Cir. 1989); *see generally* 2 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation § 6F.03 (1995). In deciding whether to extend the *per se* rule to a previously unexamined business practice, we are to examine whether "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, ... or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 (1979) (quotation omitted).

[1] The Korean registration system is not a classic horizontal market division agreement in which competitors at the same level agree to divide up the market for a given product. Metro does not point to, and we have not found, a single instance in which an arrangement similar to the Korean manufacturer-exporter design registration system has undergone judicial scrutiny in the Sherman Act context. The novelty of this arrangement, "strongly supports application of rule-of-reason analysis." *Northrop*, 705 F.2d at 1051; *see also United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607-08, 92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.").

[2] Further, as discussed below, there is no evidence of a negative effect on competition, which also militates against extension of the *per se* rule. *Northrop*, 705 F.2d at 1052; *Cascade Cabinet Co. v. Western Cabinet & Millwork Inc.*, 710 F.2d 1366, 1372 (9th Cir. 1983). The record reveals that the registration protection was limited to particular designs of a product "based on shape, appearance, and color of the products." *Vollrath*, 9 F.3d at 1462. The protection extends for only three years, renewable for three additional years. Contrary to Metro's assertions, the record does reveal the output increasing potential of the registration system. Sammi's

general manager of housewares indicated that tooling and production of a new product takes several years. Thus, the limited protection could encourage manufacturers to develop and produce new products, knowing that they would have the exclusive right to export a particular design for a limited period of time.

[3] Finally, there is no evidence that the purpose of the design registration system was to restrain trade, which also counsels in favor of rule of reason analysis. *Northrop*, 705 F.2d at 1053. The Korean association was apparently a quasi-governmental group (in that it was sanctioned by the Korean government and three of its thirteen members were representatives of the Korean government) that was formed to ensure product and design quality and to protect from copying. Sammi's general manager of housewares indicated that the system was designed "to promote the manufacturer to develop better quality product, a better quality design, and protect them from copy[ing] by other manufacturers."

[4] Accordingly, rule of reason analysis is appropriate in this case.

B. Foreign Conduct Cannot Be Examined Under the Per Se Rule

[5] Even if Metro could prove that the registration system constituted a "market division" that would require application of the *per se* rule if the division occurred in a domestic context, application of the *per se* rule is not appropriate where the conduct in question occurred in another country. Determining whether the registration system was a violation of the antitrust laws would still require an examination of the impact of the system on commerce in the United States. "The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6, 106 S. Ct. 1348, 1354 n.6, 89 L. Ed. 2d 538 (1986). *See also*

Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2909, 125 L. Ed. 2d 612 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."). [4] According to a leading treatise:

> [T]he conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets. A foreign joint venture among competitors, for example, might be more "reasonable" than a comparable domestic transaction in several respects: the actual or potential harms touching American commerce may be more remote; the parties' necessities may be greater in view of foreign market circumstances; and the alternatives may be fewer, more burdensome, or less helpful.
>
> The fact that foreign conduct would be a per se offense—one that is condemned without proof of particular effects and with little regard for possible justifications in the particular case—when entirely domestic does not call for a fundamentally different analysis. Domestic antitrust policy uses per se rules for conduct that, in most of its manifestations, is potentially very dangerous with little or no redeeming virtue. That rationale would be inapplicable to foreign restraints that, in many instances, either pose very little danger to American commerce or have

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[4] *See also Power East Ltd. v. Transamerica Delaval, Inc.*, 558 F. Supp. 47, 49 (S.D.N.Y.) (holding that plaintiff could not bring Sherman Act claim where the activities forming the basis of the claim were "centered, and have their effect, solely outside United States' commerce"), *aff'd without opinion*, 742 F.2d 1429 (2d Cir. 1983); *United States v. Westinghouse Elec. Corp.*, 471 F. Supp. 532, 542 (N.D. Cal. 1978) ("United States antitrust laws are implicated only where the actual or intended effect of a foreign transaction is sufficiently large to cause a cognizable injury to United States commerce."), *aff'd*, 648 F.2d 642 (9th Cir. 1981).

> more persuasive justifications than are likely in similar restraints at home. For example, price fixing in a foreign country might have some but very little impact on United States commerce.

1 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 237 (1978). Thus, the potential illegality of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States, regardless of the inherently suspect appearance of the foreign activities. Consequently, where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation.

II. JURISDICTIONAL INQUIRIES ARE REQUIRED WHEN A SHERMAN ACT CLAIM IS BASED ON FOREIGN CONDUCT

When we examine foreign conduct to determine if there is an antitrust violation, our jurisdiction is not a foregone conclusion. "When foreign conduct is involved, the courts customarily appraise its substantive antitrust significance only after deciding whether the Sherman Act asserts jurisdiction over it. . . . '[J]urisdictional' and 'substantive' inquiries are not wholly independent." *Id.* We examined the jurisdictional considerations in applying the Sherman Act to foreign conduct in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*), and *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032, 105 S. Ct. 3514, 87 L. Ed. 2d 643 (1985). Both cases concerned an American lumber producer's Sherman Act claims based on its allegations that Bank of America and several co-conspirators had conspired and acted to preclude a subsidiary of Timberlane from competing in the Honduran lumber market and exporting lumber into the United States.

In *Timberlane I*, we articulated a "jurisdictional rule of reason," to be applied to Sherman Act claims arising out of

foreign conduct. The inquiry requires the weighing of the answers to three questions:

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

549 F.2d at 615. The comity question alone requires the consideration of several elements, including:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614. The district court had dismissed Timberlane's claim pursuant to Rule 12(b)(6) because it determined that the activities in Honduras had not had a "direct and substantial effect on American foreign commerce." *Id.* at 615. We found, however, that Timberlane's allegations that the activities "were intended to, and did, affect the export of lumber from Honduras to the United States" and the magnitude of the effect alleged were sufficient to state a claim, and that the jurisdictional dismissal could not be sustained absent an examination of the comity question by the district court. *Id.* Thus, we reversed and remanded to the district court.

Upon remand, the district court allowed additional discovery, and eventually dismissed Timberlane's claim for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). In affirming the dismissal, we acknowledged "that Rule 56 [summary judgment] treatment is required . . . when 'the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits.' " *Timberlane II*, 749 F.2d at 1382 (quoting *Thornhill Publishing Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 735 (9th Cir. 1979)). While the first two prongs of *Timberlane I*, the effect on U.S. commerce and the type and magnitude of alleged illegal behavior, would likely require a resolution of the merits of the Sherman Act claim, the third prong, comity considerations, "can involve a policy judgment that requires a consideration only of the facts as alleged." *Id.* at 1382. Thus while dismissal based on the first two prongs would likely require Rule 56 treatment and an absence of a dispute about material facts, dismissal under Rule 12(b)(1) based on comity considerations is permissible.

Turning to the district court's application of the "jurisdictional rule of reason," we found that Timberlane adequately pleaded that there was an actual or intended effect on American foreign commerce and that Timberlane had made the minimal injury allegations necessary to support an a Sherman Act claim, thus satisfying the first two prongs of the *Timberlane I* test. *Id.* at 1383. As for the comity prong, we found that the conduct in Honduras at issue was allowed or even encouraged by Honduran law; thus the factor considering "the degree of conflict with foreign law or policy," weighed strongly against Sherman Act jurisdiction. *Id.* at 1384.[8]

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[8]A foreign country's allowing or even encouraging particular conduct which is prohibited in the United States no longer provides a sufficient basis for finding a conflict between foreign and domestic law. Where a party does not claim that the foreign country's "law requires them to act in some fashion prohibited by the United States . . . or claim that their compliance with the laws of both countries is otherwise impossible," there

Other factors, including the relative insignificance of the actions to the U.S. lumber market compared with the significant impact on the Honduran lumber market, the lack of evidence of intent to affect the U.S. market, and the lack of foreseeability of an effect on the U.S. market, also counseled against jurisdiction. *Id.* at 1384-85. We concluded that the exercise of federal jurisdiction would not be proper. *Id.* at 1386.

[6] Metro has made sufficient allegations to state a claim under the Sherman Act. Comity considerations are less compelling here than they were in *Timberlane*. Under *Hartford Fire Ins.*, 113 S. Ct. at 2910-11, there is no conflict with foreign law or policy because the Korean holloware registration system was not compelled by the Korean government, even though three government representatives serve on the design and pattern registration committee. Though Sammi is a foreign corporation, it apparently does a great deal of business in the United States, so it has assets which could be used to secure any judgment against it. The impact of the registration is felt more in the United States than in Korea because the registration system only limits the *export* of particular designs, and it was certainly foreseeable that these export restrictions could affect the United States. Considering all the factors, principles of comity and fairness do not deprive this court of jurisdiction.

[7] As *Timberlane II* makes clear, the other two prongs of the "jurisdictional rule of reason" test are substantially inter-

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is no conflict between the domestic and foreign law. *Hartford Fire Ins.*, 113 S. Ct. at 2911 (reviewing a Ninth Circuit decision in which we applied *Timberlane I* to foreign conduct but found no comity defense). While *Hartford Fire Ins.* overruled our holding in *Timberlane II* that a foreign government's encouragement of conduct which the United States prohibits would amount to a conflict of law, it did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I*.

twined with the merits of Metro's Sherman Act claim. Thus, while we could ultimately determine that we lack subject matter jurisdiction over Metro's Sherman Act claim because of a lack of impact in the United States, such a conclusion would only come after the factual inquiry into markets, market power, and other factors necessary to find a substantive violation of the Sherman Act. By alleging in its complaint that because of Sammi's manipulation of the registration system "existing and potential competition in the relevant markets has been unreasonably restrained and substantially lessened, independent United States importer-distributors have been severely damaged or eliminated from the markets, concentration has been increased in those markets, and a tendency towards monopoly has been created," Metro has made the minimal allegations about the impact on competition in the United States necessary to state a claim for a Sherman Act violation. We have jurisdiction to review Metro's claims, and examine Sammi's alleged conduct under the rule of reason.

III. Metro Cannot Show a Substantial Anticompetitive Effect in the United States or Antitrust Injury

[8] Under the rule of reason, a plaintiff must establish "antitrust injury," that is, that the conduct at issue actually caused "injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged." *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). Because Metro relies almost entirely on a *per se* argument, it points to little evidence of the impact of the Korean registration system on competition in the United States. It merely suggests that it *could* present evidence of "the harm and consequent damage to Metro and its customers" and "the harm to Vollrath and its customers stemming from Vollrath's withdrawal from the market." In responding to a motion for summary judgment, however, "the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Matsushita*, 106 S. Ct. at 1356. "[T]he record must be sufficient to 'lead a rational trier of fact to find

for the non-moving party.' " *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992) (quoting *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356), *cert. denied*, 113 S. Ct. 305, 121 L. Ed. 2d 228 (1992). We conclude that under the *Vollrath* record, a rational trier of fact could not find in favor of Metro on its Sherman Act claim.

To show an injury to competition, the plaintiff ordinarily "must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir.), *cert. denied*, 502 U.S. 994, 112 S. Ct. 617, 116 L. Ed. 2d 639 (1991). However, if a plaintiff can show "that the restraint has actually produced significant anti-competitive effects, such as a reduction in output," "a formal market analysis becomes unnecessary." *Id.* Nonetheless, while "conduct that eliminates rivals reduces competition," "reduction of competition does not invoke the Sherman Act until it harms consumer welfare." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir.), *cert. denied*, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995).

[9] Metro has produced no evidence of actual injury to competition in the United States. Rather, based on its own conclusion that the relevant market consists only of stainless steel steamers, it asserts that Sammi has a monopoly in that market and that output would only be reduced in the United States if Sammi chose to do so. The delays in Metro's and Vollrath's receipt of steamers are insufficient to show an injury to competition and consumers. Though Metro alleges that Vollrath was forced out of the steamer market as a result of Sammi's actions, Metro has produced no evidence of reduced output or increased prices. Metro merely relied on the *Vollrath* record and speculated that it could provide direct evidence of injury to competition in the future. These assertions are insufficient to satisfy *Matsushita*'s requirement that Metro come forward with specific facts supporting its claims of

injury to competition when responding to a motion for summary judgment.

[10] The *Vollrath* record demonstrates that Metro cannot make the more-commonly utilized circumstantial showing of a negative impact on competition because the record insufficiently establishes a relevant market. In *Vollrath*, we found it "highly doubtful that stainless steel steamers constituted a relevant market." 9 F.3d at 1462.

> Vollrath's expert testified that these steamers could be treated as a product distinct from other steamers, such as those made from aluminum or other materials, and "in a sense" could be viewed as constituting "a market of their own." This is hardly a firm conclusion of a separate market for stainless steel steamers. Furthermore, even this inconclusive opinion was not reasonably based on sound data. There was no detailed examination of market data or any analysis of cost, comparable usage, or comparative features of other competing products. The opinion was based on limited anecdotal evidence.

Id. Thus, we concluded as a matter of law that "[t]here was insufficient evidence [in the *Vollrath* record] concerning the relevant product and geographic market and Sammi's economic power in that market." *Id.*

[11] The *identical* record is before us in the case at bar, Metro having based its opposition to Sammi's motion for summary judgment on the *Vollrath* record alone. Collateral estoppel does not bar Metro from relitigating the issue of the relevant market addressed in *Vollrath*; though they shared the same attorney, Metro and Vollrath, as competitors, were not in privity. *See Shaw v. Hahn*, 56 F.3d 1128, 1131 (9th Cir.) ("The doctrine of issue preclusion, of course, cannot be applied against a litigant who was not a party to or in privity with a party to the prior proceeding."), *cert. denied*, 116 S. Ct.

418, 133 L. Ed. 2d 336 (1995).[8] However, because the facts of this case are identical to and indistinguishable from the facts of *Vollrath*, we follow *Vollrath* and conclude that Metro has not presented sufficient evidence from which a rational finder of fact could conclude that Sammi had market power in a relevant market. Thus, a finder of fact could not conclude that the Korean registration system had a negative impact on competition or consumer welfare in the United States, so Metro cannot show that it has suffered an antitrust injury. Consequently, Metro cannot recover for any alleged violation of § 1 of the Sherman Act by Sammi. The district court properly granted Sammi's motion for summary judgment on all of Metro's claims, and properly denied Metro's cross-motion.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's grant of summary judgment in favor of Sammi, and AFFIRM the district court's denial of Metro's cross-motion for summary judgment.

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[8]The fact that Vollrath and Metro shared a common attorney and argued similar theories of liability is not sufficient to demonstrate privity between the two parties. *See, e.g., Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) ("A plaintiff cannot be precluded from bringing his own suit because he chose an attorney who participated in a prior suit."); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 864 (5th Cir. 1985) ("[F]or parties to be so 'closely aligned,' or that the party's representation in the first suit 'adequately' represents the nonparty's interests in the first suit so as to preclude a nonparty in subsequent litigation, requires more than a showing of parallel interests or, even, a use of the same attorney in both suits.").

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO INDUSTRIES, INC., Plaintiff,	)	CIVIL ACTION 83-7931 (MRP)
vs.	)	
KEN CARTER INDUSTRIES, INC. SAMMI (AMERICA) CORP., and SAMMI CORPORATION, Defendants.	)	

ORDER AND JUDGMENT

WHEREAS, THIS CAUSE was tried in part to the Court commencing on June 17, 1986 and concluding on June 26, 1986; and

WHEREAS, the Defendants Ken Carter Industries, Inc. ("Ken Carter"), Sammi (America) Corporation ("Sammi America") and Sammi Corporation ("Sammi") have moved for dismissal of all claims pursuant to Rules 52(c) and 56(b) of the Federal Rules of Civil Procedures; and

WHEREAS, the Plaintiff Metro Industries, Inc. ("Metro') has previously advised the Court at hearings on May 21, 1990 and August 13, 1990 that it was waiving or abandoning its claims against Defendants Ken Carter and Sammi America and specifically recited in its papers filed in response to the pending motion that it does not oppose the motion to dismiss the claims as to Ken Carter and Sammi America; and

WHEREAS, Metro has previously advised the Court at a hearing on May 21, 1990 that it was waiving or abandoning its claims under Section 3 of the Clayton Act, and Section 7 of the Clayton Act against Sammi; and

WHEREAS, Metro has previously advised the Court at a hearing on August 13, 1990, that it was waiving or abandoning all other claims against Sammi, except its claims under Section 1 of the Sherman Act and its attempted monopolization claims under Section 2 of the Sherman Act; and

WHEREAS, Metro in its papers opposing the pending motion to dismiss only opposes the dismissal of its claims under Sections 1 and 2 of the Sherman Act; and

WHEREAS, Metro has opposed Defendant's motion to dismiss solely by reference to the record of this proceeding and by incorporation by reference of the trial record and appellate record of the closely related case entitled Vollrath v. Sammi Corporation, Ken Carter Industries, Inc. and Sammi (America) Corp. (Civ. No. 85-820) (Court of Appeals Docket No. CA90-55201), cert. denied. 62 U.S.L.W. 3807 (June 6, 1994);

NOW upon Defendants' Notice of Motion dated May 5, 1994, the accompanying Declaration of John E. Tardera, dated May 5, 1994, together with the exhibits annexed thereto; the Statement of Uncontroverted Facts of Defendants Ken Carter, Sammi America and Sammi submitted pursuant to Local Rule 7.14.1 in support of the motion; the Declaration of Steve M. Lee in Support of Plaintiff's Motion for Dismissal of All Claims Pursuant to Federal Rules 52(c) and 56(b), dated May 11, 1994; Plaintiff's Opposition to Defendants' Motion for Dismissal under Rules 52(c) and 56(b) dated May 18, 1994, Plaintiff's Statement of Genuine Issues dated May 18, 1994 submitted in opposition to Defendant's motion; Plaintiff's Notice of Cross-Motion for Partial Summary Adjudication Under Rules 56(a) and 56(c) dated May 18, 1994; Plaintiff's Statement of Uncontroverted Facts in Support of Plaintiff's Cross-Motion for Summary Adjudiction Under Rules 56(a) and 56(c), dated May 18, 1994; Defendants'

Statement of Genuine Issues of Material Fact in Opposition to Plaintiff's Cross-Motion, dated May 26, 1994; the testimony and exhibits admitted during the trial in June 1986; and upon all prior proceedings, motions and pleadings had in this case including, without limitation, the Complaint dated December 6, 1983; the Amended Complaint dated September 12, 1985; the Pre-Trial Conference Order filed February 24, 1986 and the answers filed by Defendants; it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for summary adjudication is denied; and it is further

ORDERED, ADJUDGED AND DECREED that

1. Plaintiff's claims against Defendants Ken Carter and Sammi America under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1,2) under Section 2 of the Clayton Act (15 U.S.C. §13), Section 3 of the Clayton Act (15 U.S.C. §14), Section 7 of the Clayton Act (15 U.S.C. §18), and Sections 16700-16751 and 17000-17096 of the Cal. Bus. & Prof. Code, have been waived and abandoned by the Plaintiff, and the Plaintiff has, in any event, failed to show that there exists a genuine issue of material fact requiring a trial on such claims;

2. Plaintiff's claims against Defendant Sammi for actual monopolization under Section 2 of the Sherman Act (15 U.S.C. §2), under Sections 2,3 and 7 of the Clayton Act (15 U.S.C. §§13, 14 and 18) and Sections16700-16751 and 17000-17096 of the Cal. Bus. & Prof. Code have been waived and abandoned and Plaintiff has, in any event, failed to show that there exists a genuine issue of material fact requiring a trial on such claims;

3. Plaintiff has failed to proffer probative evidence on its remaining claims against Sammi under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) sufficient to show that a there exists a genuine issue of material fact requiring a trial on these claims; and it is further

ORDERED, ADJUDGED AND DECREED that any and all claims by Plaintiff against Defendants Ken Carter, Sammi America and Sammi which have been raised, or which could have been raised, in this action be dismissed with prejudice; that judgment be entered in favor of the Defendants on all such claims; that costs be assessed against the Plaintiff, and that Defendant's application for costs shall be filed within twenty-one days following the entry of this Order.

Dated: July 6, 1994

/s/_____
Mariana R. Pfaelzer
United States District Judge

APPENDIX C

15 United States Code §1

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreement; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX D

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

METRO INDUSTRIES, INC., Plaintiff,	) CIVIL ACTION NO.
	) 83-7931(MRP) (XX)
	) DECLARATION OF
vs.	) HOON SUNG
	) (HOWARD) KIM IN
KEN CARTER INDUSTRIES, INC. SAMMI (AMERICA) CORP., and SAMMI CORP.	) SUPPORT OF
	) MOTION TO DISMISS
	)
	) Date: May 29, 1984
Defendants.	) Time: 10:00 A.M.
	) Room: 15

I, HOON SUNG (HOWARD) KIM, being duly sworn, deposes and says:

1. I am a Sales Manager for Ken Carter Industries Inc. ("Ken Carter"), one of the defendants in this action. I am familiar with the facts involved in this action, and have personal knowledge of the facts set forth in this declaration, much of which is based on conversations I have had recently with representatives of Sammi Corp. ("Sammi") in Seoul, Korea. I am making this declaration in support of Sammi's motion to dismiss the complaint against it for lack of personal jurisdiction. In particular, this declaration is limited to certain allegations made by the plaintiff, Metro Industries Inc. ("Metro") in its Rebuttal Memorandum and Declaration filed with the Court on May 18, 1984.

2. Contrary to the allegations made by Metro in its memorandum and declarations, Sammi has never entered into any formal or written exclusive manufacturing and supply agreements with Metro. Like all importers of goods from Sammi, Metro, on one or two occasions, did request that Sammi sell to it a particular item exclusively. However, Sammi never entered into any formal or written contract to this effect with Metro.

3. Likewise, contrary to plaintiff's allegation that Metro purchased cookware from Sammi "under long-term contractual arrangements", all of Sammi's sales to Metro in Korea were made on a purchase order basis. Sammi never entered into any short or long term contractual arrangements for the sale of its goods to Metro.

4. Throughout its Declarations and memoranda plaintiff has alleged that Sammi obtained Korean "patents" on Metro's product designs. Metro does not identify by reference to documents or otherwise in the text of its statements precisely which products Sammi allegedly obtained "patents" on and, more important, exactly what the "patent" system in Korea involves. Metro misleads the court by suggesting that a

Korean "patent" is similar to patents registered with the United States government.

5. On two isolated occasions, Metro purchased over the counter an aluminum-made cookware item manufactured by an American company and sent it to Sammi in Korea and requested Sammi to develop the identical product in stainless steel form for sale to Metro. On one of those occasions, Sammi "developed" the product and, together with the fabricating company, applied for a "patent". However, this "patent" is not a property right akin to the patent normally obtained in the United States and indeed with the Korean government. The "patent" which Metro refers to is merely an administrative application by Korean exporters to a non-governmental organization known as the "Korean Metal Flatware Association" (the "Association") wherein the exporter or the fabricator requests that the Association grant it the exclusive right to export that particular item only. The registration, if granted, is generally not based at all on inventiveness, creativity or ingenuity. Indeed, the registration itself contains simply a photograph of the item. The registration says nothing about size, color, measurements, or the like. It is merely an administrative priority for exporters only. Registration of this kind of "patent" does not give the Korean manufacturer or exporter any property rights or protection with respect to that particular item. Moreover, the "patent" is not sanctioned by or registered for any type of protection with the Korean government. It is administered by a self-regulating association with no governmental or legal powers.

6. Sammi receives numerous samples from importers all over the world of many types of products with requests that Sammi develop that particular product in stainless steel. Sammi is principally involved in the distribution and sale of stainless steel products. If Sammi decides to develop any of these samples, it customarily applies for a "patent" from the

Association. Likewise, other Korean manufacturers and exporters of such goods apply for such "patents" as well. The patents themselves, assuming no other company exports the product, are granted routinely.

7. In any case, on the two occasions when Metro forwarded samples to Sammi for stainless steel development, Metro did not request that Sammi obtain such a "patent". Sammi makes such decisions independently and the "patent", if granted, grants no rights whatsoever to the particular customer (i.e., Metro) who requests development.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 24, 1984.

/s/_____
Hoon Sung (Howard) Kim

APPENDIX E

01280633 NNNN+
6836063SAMMI UW
RESPOND TO SAMMISL
VIA WUI

0154 01/28+
6836043SAMMI UWLSA

TO: SAMMI CORP LA
FM: SAMMI CORP SEOUL JAN 28

HW-37

ATTN MR. H S KIM

RE: YR TLX JAN 27. P.0 1171.

WE DISCUSSED W/MAKER SERIOUSLY ABOUT THIS MATTER.
5022 RICE COOKER IS PATENTED AT HOLLOWARE EXPORT ASSOCIATION N GAVE EXCLUSIVITY TO METRO. SO IF THEY DO NOT KEEP OUR PRICE, IT IS VERY BIG PROBLEM FOR US.
PLEASE PERSUADE THEM ABOUT OUR SITUATION N KEEP PRICE AS USD 9.00 AS MUCH AS POSSIBLE.
ANYWAY WL QUOTE AS US 8.85 AS LAST HIDDEN PRICE AT UNFAVORABLE CONDITION.

RGDS
J S LIM

APPENDIX E

NNNNM
ZOZC AJS389
EX LOS

TO: SAMMI CORP LA
FM: SAMMI CORP SEOUL FEB 19

32a

HW-12
ATTN MR. H S KIM

RE: METRO S SHAPE KETTLE

THEY PLACED 2400PCS N 3600PCS ALREADY TO S.C. KIM OF HAE DONG. AND PUSHING EVERYDAY TO SHIP ABV MERCHANDISE.
BUT FACTORY DO NOT WANT TO SHIP ABV ODR THROUGH S.C.KIM BCOZ OF LOWER PRC N BAD BEHAVIOR TO THEM.
FURTHERMORE, FACTORY PROMISED US THEY WILL NOT SHIP ABV ODR THROUGH S.C.KIM ENDER ANY CIRCUMSTANCE.
PLS ADV THIS MATTER TO METRO.

B.RGDS KH KIM

APPENDIX E

TO: SAMMISA SEOUL
FM: SAMMISA LA APR 30
ATTN MR Y I KIM/ MR D C KWAK
RE: METRO

1) TKS FOR UR TIMELY SHPT.
2) AS WE IFMD MR WI RHEE ON THE PHONE, MR WARREN KASHUK WL STAY AT SILLA HTL MAY 3 TO MAY 5. PLS BE SURE TO LET HIM REALIZE THAT FACTORY IS TIGHTLY TIED TO SAMMISA N IF POSSIBLE, LET HIM UNDERSTAND MAKER WL USE SAMMISA ONLY AS THEIR EXPORT WINDOW. THE REASON WHY WE ASKING U THIS IS THEY MIGHT ASK US TO GIVE THEM ANOTHER D/A. BUT CURRENT SITUTATION IS WE CAN'T GIVE THEM ANY ADDITIONAL D/A EVEN IF WE KNOW THEY ARE SELLING SUCCESSFULLY. MEANWHILE WE UNDERSTAND THEY ARE IMPORTING M BOWL UNDER D/A THRU OTHER TRADING CO. SO LET HIM UNDERSTAND IF THEY NEED MORE COPPERWARE, THEY HV NO CHOICE BUT IMPORT ONLY THRU SAMMISA BY L/C BASE.

RE: HOUSEHOLD

1. FEEL VERY SORRY ABOUT THIS. STILL WE ARE URGING THEM TO SETTLE THIS MTR SOONEST POSSIBLE. WL HV ANOTHER MEETING TOMORROW.
2. WE ARE CONSIDERING EVERY POSSIBLE SOLUTION TO FINALIZE THIS DEAL. ANYHOW PLS CHECK N IFM FLWGS:
    1) CAN U MAKE UR OWN COLOR BOX DESIGN OF KITCHEN TOOL?
    2) IF POSSIBLE WHEN CAN U SEND COLOR BOX SAMPLE? (NOT DESIGN BUT COMPLETE BOX)
    3) WHAT'S THE COST OF MAKING NEW COLOER BOX SAMPLES?

RE: T N R
DID U HEAR FR THEM RECENTLY?
RGDS, H S KIM